IN THE HIGH COURT OF JUDIATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.1090 OF 2003

Oriental Insurance Co. Ltd. .. Appellant.

Versus

1. Pritam Rajiv Shetty
Residing at 8, Beach
View Apartments
77, Chimbai Road,
Bandra (W), Mumbai 400 050 ..

2. Rajendra Sambhaji Naikar
Nalaya Chawl, Room No.2,
Ashok Nagar, Baldongri,
Kandivli (E), Mumbai 400 101 .. Respondents.

Shri S.M.Vidyarthi for the appellant.

Shri V.R.Shetty for respondent no.1.

CORAM : SMT.RANJANA DESAI
& D.B.BHOSALE, JJ.

Date of reserving
the judgment : 10th February 2006

Date of prounouning
the judgment : 28th February 2006.

ORAL JUDGMENT: (PER D.B.BHOSALE, J.)

1. Oriental Insurance Company Ltd. has filed the instant appeal under section 173 of the Motor Vehicles Act, 1988 (for short "the Act") against the judgment and order dated 19th and 21st June, 2002 rendered by the Motor Accident Claims Tribunal

on Application No.2201 of 1994. By the impugned judgment the appellant and respondent no.2 - driver/owner of the two wheeler, involved in the accident, are held to be jointly and severally liable to pay, to the claimant - respondent no.1, the compensation of Rs.2,65,000/- with interest at the rate of 9% per annum from the date of application. Leave to defend respondent no.2 as contemplated under section 170 of the Act was granted to the appellant.

2. Few facts may be stated in order to better comprehend the question posed before us. On 13.1.1994 at about 5.45 p.m. the claimant - respondent no.1 was pillion rider on the motor cycle bearing registration No. MH-02-D-6643 driven by respondent no.2. He was allegedly driving at an excessive speed and while attempting to overtake a stationary vehicle/tempo on Andheri-Kurla Road without keeping a safe distance and proper look-out, collided against the door of the stationary vehicle resulting in a serious accident. Due to the impact respondent no.1 was thrown on the right side of the road. According to respondent no.1 the accident occurred only due to rash and negligent driving of the motor cycle causing him

serious injuries. The other version that has come on the record is that when due to the impact of collision respondent no.1 was thrown on the road, a truck passing by the said road dashed him which caused serious injury to his lumber region. Respondent No.1 claims that at the time of accident he was in the best of health and was actively attending to his business of manufacturing special purpose machines and press tools, run under the name and style of "Aum Ventures" Nanddham Industrial Estate, Marol, Mumbai. Due to the accident the applicant was bed ridden for about six months and as a result thereof his business came to standstill and he lost goodwill amounting to great financial loss. He further claims that due to the accident he suffered great physical and mental pain and he was also required to incur heavy expenditure on the medical treatment. Against this backdrop he had also expressed apprehension of having suffered a permanent disability and loss of future earning capacity. It may be noticed at this stage that no permanent disability of whatsoever nature was pointed out having suffered by respondent no.1. It is against this backdrop he claimed compensation to the tune of Rs.17,00,000/- with interest.

3. The motor accident claims tribunal allowed the claim application and awarded Rs.2,65,000/- as compensation with interest at the rate of 9% from the date of application. The rash and negligent driving on the part of the driver of the offending vehicle causing grave injuries to respondent no.1 is held to be proved. The contention of the appellant that insurance policy did not cover the pillion rider and hence it is not liable to pay the compensation to respondent no.1, however, has been negatived by the tribunal.

4. We heard learned counsel for the parties and perused the impugned judgment, depositions and all other material placed before us. The argument advanced by Mr.Vidyarthi, learned counsel for the appellant, was three fold. Firstly, it is clear from the evidence on record that respondent no.2 was not rash and negligent when the accident occurred and, therefore, the appellant cannot be held liable to pay the compensation. It is only because of the negligence of the driver/owner of the stationary tempo, who opened the door suddenly, the accident occurred. Secondly, he submitted that the tribunal on consideration of the entire evidence adduced by the parties recorded a finding

to the effect that the accident occurred on account of composite negligence for which respondent no.2 - tempo driver was also equally responsible and hence the liability cannot be fastened onto the appellant only. The insurers, if any, of the tempo and truck, involved in the accident, being tortfeasors are also liable to pay the compensation to respondent no.1. In other words, according to Mr.Vidyarthi, in any case the liability of the appellant would not be more than 1/3rd of the amount of compensation. He then submitted that the tempo driver, the truck driver and their insurers were necessary parties to the claim application and since they were not added as party, the claim should fail on the principle of non-joinder of necessary party. Lastly, he submitted that looking to the prevailing rate of interest, the rate of interest awarded by the tribunal is excessive and may be reduced to 7.5% per annum. He did not raise any other contention.

5. In response to the second contention advanced by Mr.Vidyarthi, Mr.Shetty, learned counsel for respondent no.1, submitted that this contention was neither urged before the tribunal nor any such application seeking addition of the

tempo driver or truck driver and/or their insurers' was made by the appellant and, therefore, it is not now open to raise such contention. He further submitted that even if it is assumed that such contention was raised, the choice was of the respondent-claimant to choose against whom he desired to proceed for compensation and in view thereof the submission of Mr.Vidyarthi deserves to be rejected outright. He further pointed out, after taking us through the material on record, that respondent no.2 was negligent since he did not keep safe distance while overtaking the stationary vehicle. Had he been deligent and careful while overtaking the stationary vehicle the accident would not have occurred and, therefore, the tribunal has rightly held that he was also rash and negligent while driving the motor cycle. Insofar as the rate of interest is concerned, he submitted that this being a claim of 1994 decided in June 2002, the rate of interest awarded by the tribunal is appropriate and needs no interference in the appeal.

6. From perusal of the evidence of the claimant it appears that the motor cycle collided with the tempo and as a impact thereof respondent

no.1 was thrown on the right side of road and was thereafter dashed by a truck coming from Kurla side, causing serious injuries to his lumber region. The evidence of the claimant, insofar as speed of the motor-cycle at the relevant time is concerned, though is not consistent with the pleadings, it is clear that it was not slow or reasonable and, therefore, respondent no.2, who was driving the motor cycle could not control the vehicle either by applying emergency brakes or avoiding collision with the door of the stationary vehicle. Moreover, while overtaking he ought to have kept safe distance between the stationary tempo and his motor cycle. It appears from the evidence that the tempo was parked on the road. Keeping that in view respondent no.2 should have been more careful while overtaking the tempo by keeping a safe distance and had he done so he could have avoided the accident. Looking to the evidence on record, the driver of the motor cycle cannot shirk his responsibility. He ought to have taken due care while overtaking the stationary tempo. Respondent no.1 was driving the offending vehicle from left side of the road and while so doing he should have driven his two wheeler at very slow speed by which he could have applied emergency brake and/or avoided the collision. Neither

respondent no.2 nor the tempo driver was careful while driving the motor cycle and opening the door of tempo.

7. Rash and negligent driving does not in every case necessarily mean the excessive speed. Not taking due care while driving the vehicle and in particular overtaking, either stationary or moving vehicle also would amount to rash and negligent driving. In the instant case it is clear from the evidence that such care was not taken by respondent no.2. We find absolutely no reason to interfere with the finding that respondent no.2 was rash and negligent while driving the motor cycle at the relevant time. Even if it is assumed that tempo driver was equally negligent he alone cannot be held liable for the alleged accident as tried to be contended by the learned counsel for the appellant.

8. That takes us to consider the next submission that the claim deserves to be dismissed on the principle of non-joinder of necessary parties. Admittedly, the tempo driver and its insurers' were not joined as party to the claim

application. It is equally true that neither the appellant made any application before the tribunal seeking directions to the claimant to add the tempo and truck drivers or their insurers as party to the proceedings nor did the tribunal suo motu issued such direction to the claimant. The tribunal after considering the pleadings and evidence on record has, however, observed that this is case of composite negligence. Keeping that in view, in our opinion, the claim would not fail on the principle of non-joinder of the tempo driver or its insurer as necessary parties to the claim application as tried to be contended by Mr.Vidyarthi, learned counsel for the appellant. It is true that it is a duty of the claimant to furnish the registration number of each one of the vehicles involved in the accident as also the names of its owners and the insurers. However, if the claimant fails to furnish the registration number of such other vehicle and/or to add its owner or insurer as party to the claim application and if he fails to prove negligence of the driver of the vehicle, against whom the claim application is filed, his claim application would fail. In other words, the claimant runs a risk by not joining the driver of other vehicle or its insurer as party to the claim application. Merely because the driver of some

other vehicle or its insurer is not added as party to the proceedings, the application would not fail for non-joinder of the necessary parties, if it comes to the light that in fact such other vehicle was also responsible for the accident. In short, the claim application is not liable to be dismissed on the principle of non-joinder of the necessary parties. As a matter of fact it is the duty of tribunal to call upon the parties to furnish the registration number of vehicle/s, the name of the owner/s and its insurer/s and issue notice to all of them and thereafter make full and complete adjudication of the application. In the instant case such exercise had not been undertaken by the tribunal and even the appellant also failed to make such request to the tribunal. In our opinion, the claim application cannot be rejected on the ground of the principle of non-joinder of necessary party. Moreover, we may also notice that the claim application is not a plaint governed by the Code of Civil Procedure or it is not a civil suit but it is the special proceedings under the Special Act and, therefore, the law of which strict compliance is required while filing the civil suit cannot be applied while dealing with the proceedings under the Special Act.

9. The appellant for the first time in the instant appeal has raised the contention that they are responsibile only to the extent of 1/3rd of the liability since two more vehicles were involved in the accident and were equally responsible for the same. Such plea was not raised in the claim petition nor was it raised across the bar before the tribunal. Had the appellant raised such contention before the tribunal, perhaps the tribunal would have directed the parties to furnish particulars of the tempo and truck which were allegedly involved in the accident. Such request was not made even in the present appeal. In view thereof the argument must be rejected. In any case the claimant is entitled for compensation awarded by the tribunal and which we found to be most appropriate, in the facts and circumstances of the case. Had the claimant joined the drivers and insurers of the vehicles, involved in the accident, the tribunal could have held them jointly and severally responsible and in that case the claimant could have recovered it either from the driver/owner or insurer of motor-cycle or of tempo or of the truck. The appellant would at the most, have a right to proceed against the driver/owner of the tempo or its insurer and make such claim in

accordance with the law. In any case in the instant appeal, the appellant for the first time cannot be allowed to contend that their liability is only to the extent of 1/3rd of the compensation awarded by the tribunal.

10. Insofar as the last submission of Mr.Vidyarthi, that the interest awarded by the tribunal is excessive and that it may be reduced to 7 1/2% is concerned, a reliance was placed upon the judgment of the Apex Court in **New India Assurance Co. Ltd. Vs. Charlie and Anr. 2005 (2) T.A.C. 297 (SC)**. In view of the peculiar facts and circumstances of the instant case, in our opinion, the judgment of the Apex Court in that case is of no use to the appellant. Looking to the date of accident and the amount of compensation awarded by the Tribunal, in our opinion, this is not a fit case to interfere with that part of the judgment. The amount deposited by the appellant under section 173 of the Act be refunded in accordance with law. The first appeal is, accordingly, disposed of in the aforesaid terms. No order as to costs.

(SMT.RANJANA DESAI, J.)

(D.B.BHOSALE, J.)